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A SUMMARY OF CONTRADICTIONS: AN OUTLINE OF THE EU’S MAIN INTERNAL AND EXTERNAL APPROACHES TO ETHNIC MINORITY PROTECTION

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José Ortega y Gasset1

Abstract: A number of available legal instruments have the potential to contribute to the elaboration of an EU minority protection standard. These instruments, however, are mostly limited to guaranteeing simple nondiscrimination, which is not enough to ensure minority protection stricto sensu. The lack of any viable internal minority protection standard did not prevent the European Union from treating minority protection as one of the key elements of the pre-accession process leading to the Eastern enlargement, reinforcing the internal-external competence divide and reducing the effectiveness of minority protection in the European Union. Although minority protection was one of the Copenhagen political criteria—and thus at the core of the conditionality principle presupposing a fair assessment of the candidate countries’ progress on the merits—the Commission clearly used minority protection in a discriminatory way, tolerating the standard of assimilation in one group of candidate countries (Latvia, Estonia) and backing cultural autonomy in others. Thus, alongside the internal toleration or simple denial of minority problems in the European Union, the Commission simultaneously promoted two contradicting approaches in external relations: de facto assimilation, which is prohibited by article 5(2) of the Framework Convention for the Protection of National Minorities, and cultural autonomy, which brings to life a complicated web of partly overlapping, partly contradicting standards.

José Ortega y Gasset, Toward a Philosophy of History 57 (1940).
INTRODUCTION: AN EDIFICE OF MANY CONTRADICTIONS

“Stubbornly thinking in symbols”: this is how a Czech mayor, busy with building a Roma ghetto in the town of Ústí nad Labem, characterized the European Union (EU).2 The mayor in question is not the only person in Central and Eastern Europe to ascribe equality, non-discrimination, and human rights protection only a “symbolic” value. Luckily, the European integration project is largely built around a set of values quite different from the local prejudices found in Member States and candidate countries. Minority protection is one of those principles, vital for the successful creation of a Union based on democracy, the rule of law, and respect for human rights.

The articulation of the pre-accession principle of conditionality3 during the preparation of the Eastern enlargement of the European Union4 provided the organization with a number of tools of influence necessary to effectively alter the situation of minority protection in the candidate countries and other states willing to accede.5 Such developments notwithstanding, the fact that the European Commission (Commission) has honored the minority protection criterion with unprecedented attention surprised a number of academics.6

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3 The essence of the principle of conditionality was to make the accession of the candidate countries to the European Union conditional on a number of preconditions spelled out by the Commission. An elaborate system of legal and political instruments was used to check the candidate countries’ compliance with the preconditions formulated. See Dmitry Kochenov, EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law, Ch. 2 (2008).

4 The fifth enlargement round accommodated Estonia, Latvia, Lithuania, Poland, Slovakia, Hungary, Slovenia, Malta, Cyprus, and the Czech Republic. See Treaty Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, 2003 O.J. (L 235) 17. The sixth enlargement round accommodated Romania and Bulgaria. See Treaty Concerning the Accession of the Republic of Bulgaria and Romania to the European Union, 2005 O.J. (L 157) 11.


Academics were astonished because minority protection as such lies outside the scope of the *acquis communautaire.* However, given a goal-oriented reading of articles 49 and 6(1) of the European Union Treaty (EU Treaty) in light of article 5 of the Treaty Establishing the European Community (EC Treaty), the Commission’s activities during the pre-accession process were not constrained by article 5 of the EC Treaty’s competence limitations because only checking the candidates’ adherence to the “democracy, the Rule of Law and human rights” issues falling within the scope of the *acquis* would contradict the very purpose of article 6(1) of the EU Treaty, which clearly has an overwhelming scope, not restricted by Community competence limitations. Thus it is not surprising that minority protection, along with other issues generally falling outside the scope of the *acquis,* became one of the corner-stones of the pre-accession. Ethnic minority protection is not the only example of such practice—the rights of sexual minorities, for instance, have been included by the Commission into the pre-accession assessment even though the *acquis* did not include any Community competence on this issue at the time when regular reporting had started and the case law of the European Court of Justice (ECJ) was rather hostile to EU citizens belonging to sexual minorities.

Judging by the reports and opinions released by the Commission during the preparation of the eastern enlargement, it can be concluded that minority protection was at the core of the pre-accession process. Sections of the Copenhagen-related documents concerning the assessment of this criterion are considerably longer than the sections concerning other issues. The analysis contained therein covered a large number of minority protection issues. Reports concerning some countries even adopted a unique sub-structure of the minority protec-

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8 Presidency Conclusions, Copenhagen European Council (June 21–22, 1993). For general information on the Copenhagen Criteria, see generally Christophe Hillion, *The Copenhagen Criteria and Their Progeny, in EU Enlargement,* supra note 5, at 1.

9 See, e.g., Written Question No. 2224/96, 1996 O.J. (C 365) 95; Written Question No. 2134/83, 1984 O.J. (C 152) 25; Written Question No. 2126/83, 1984 O.J. (C 173) 9.


tion section, something the Commission did not do while addressing other issues.

Such an approach to minority protection can be regarded as a logical response to the rise of nationalism in Central and Eastern European countries, and is clearly connected with the European Union’s stability and security concerns. Although it has been argued that “nationalism is an inevitable factor in the creation of the post-communist state,” not all scholars share this view. At the same time, it is impossible to deny that historically, minority protection has always been especially acute for Central and Eastern European countries. This was particularly true during the interbellum period between the two world wars, when the dissolution of several empires and the creation of new nation states shifted borders and gave rise to a number of minority problems all over the region.

The prominent role played by minority protection during the pre-accession process leading to the last enlargement did not result in (and was not based on) elaboration of any serious minority protection standard that the European Union could use both internally and externally, especially during the preparation of the coming enlargements. Such a standard will be needed in the future because the

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enlargement saga is far from over. In 2007, the European Union embraced two new Member States (Bulgaria and Romania) and more will join in the future. Three countries currently enjoy a candidate country status: Croatia; Macedonia (FYROM); and Turkey. Moreover, a number of countries in Europe, including Albania, Armenia, Bosnia and Herzegovina, Georgia, Montenegro, Moldova, Serbia, and Ukraine, made it clear that joining the European Union is among their foreign policy priorities. In other words, the European Union stands somewhere in the middle of its enlargement road. In the future, enlargements are likely to stay on the EU agenda for several decades. It goes without saying that all countries in question, and especially Turkey with its treatment of the Kurdish minority, and the Balkan states recovering from violent ethnic conflicts, have a number of outstanding minority issues. The European Union will have to address these issues during the pre-accession process. To effectively do so, a reliable minority protection standard is required.

As analysis of the application of the conditionality principle demonstrates, the European Union employed at least two mutually exclusive standards during the pre-accession process. The first was roughly built on the idea of tolerating (forced) assimilation (in Estonia and Latvia). The second was based on the idea of cultural autonomy (applied in other countries and, in particular, in Romania, Slovakia and Bulgaria). This process, although reflecting the state of normative disarray of internal EU minority protection, is ill-suited both for the conduct of future enlargements and, more importantly, for the effective protection of minorities within the European Union. Some difficult choices will have to be made in the near future to change this situation.

This Article illustrates two main clashes inherent in EU minority protection. First, building inter alia on the works of Hillion, Hughes

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18 The former Yugoslav republics have only recently turned to a balanced approach on minority issues. See generally Antonija Petrićušić, Constitutional Law on the Rights of National Minorities in the Republic of Croatia, 2 EUR. Y.B. MINORITY ISSUES 607 (2003).
19 See infra Section V.
20 Hillion, supra note 12, at 714–40.
and Sasse,\textsuperscript{21} and Wiener and Schwellnus,\textsuperscript{22} it discusses the internal-external divide in EU minority protection, which allows for the promotion of minority protection outside EU borders while tolerating the neglect of minority issues within. Second, through the use of several examples, this Article demonstrates that a double standard of minority protection arose from external minority protection activity of the European Union during preparation for the fifth and sixth enlargements. These contradictory practices are put into the broader context of available minority protection standards.

The whole edifice of EU minority protection that miraculously stands today is thus built on two contradictions and is unable to serve its main function—namely, to provide effective protection for minorities in the European Union.

I. Structure of the Argument

After briefly discussing the theoretical debate surrounding the very idea of minority protection (focusing on Kymlicka and Waldron), this Article first makes a clear distinction between the nondiscrimination approach taken by the Community and best articulated in the Race Directive,\textsuperscript{23} and a fully fledged vision of minority protection as understood in the Permanent Court of International Justice’s (PJIC) Minority Schools in Albania case\textsuperscript{24} that also includes special minority protection measures not limited to simple nondiscrimination. It then summarizes some legal provisions that could potentially enable the European Union to espouse a fully-fledged approach to minority protection. Second, this Article briefly focuses on the internal-external minority protection divide in the European Union, providing a summary of minority protection measures promoted by the European Union externally and constituting part of EU enlargement law. This Article also discusses the rare internal references to minority protection, which mostly come from political documents lying outside the normative

\textsuperscript{21} Hughes & Sasse, supra note 12, at 1–30.

\textsuperscript{22} Wiener & Schwellnus, supra note 12, at 1–39.


\textsuperscript{24} See Minority Schools in Albania, 1935 P.C.I.J. (ser. A./B.) No. 64 (Apr. 6, 1935). In this case, involving Greek minority schools in Albania, the Court established that formal equality was not enough to guarantee equal rights for the Greek minority residing in Albania and special rights were needed. See id. The Court found that “there would be no true equality between a majority and a minority if the latter were deprived of its own institutions and were consequently compelled to renounce that which constitutes the very essence of being a minority.” Id.
framework of EU law. The paradoxical difference between what the European Union itself adhered to and what it promoted is illustrated by one of Joseph Wieler’s maxims: “do not do what I do, do what I tell you to do”25 (initially ascribed to “officers” but equally applicable to the European Union’s policy line in the field of minority protection). Third, this Article focuses on EU minority protection standards during the fifth and the sixth enlargement rounds and connects the inadequacy of the European Union’s internal approach to minority protection with the inadequacy of the external one. To do so, the Article looks into the substance and structure of the Copenhagen-related documents released during the preparation of the Eastern enlargement with a view to discovering a standard the European Union used while applying the conditionality principle in this field.

Finally, having discovered at least two of such standards, the Article focuses on the inadequacy of the whole approach to minority protection taken by the European Union.

II. SHOULD THE EUROPEAN UNION BUILD DISNEYLANDS?

WALDRON VS. KYMLICKA

It has been suggested that liberal democracies should take a neutral stance vis-à-vis ethnocultural diversity and that equality alone, without specific minority protection rights, can meet the needs of minorities.26 Moreover, the negative effects of minority protection are clear, demonstrating the human need to belong to a distinct community,27 which in the past was taken for granted.28 Thus, the very core of arguments promoting specific rights for minorities has been seriously questioned. Jeremy Waldron opined that:

[I]mmersion in the traditions of a particular community in the modern world is like living in a Disneyland and thinking that one’s surroundings epitomize what it is for a culture really to exist. Worse still, it is like demanding funds to live in a Disneyland and the protection of modern society for the boundaries

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28 Id. at 759.
of Disneyland, while still managing to convince oneself that what happens inside Disneyland is all there is to an adequate and fulfilling life.\textsuperscript{29}

Will Kymlicka provides a drastically different approach. His argument is built around an absolute necessity to have specific minority instruments, based on the assumption that no polity can be truly ethnically neutral.\textsuperscript{30} This approach coincides with that of the League of Nations.\textsuperscript{31}

The lack of scholarly consensus on this issue is telling. A number of different practical approaches to minority protection adopted by EU Member States reflect the diversity of theories in the area. This diversity becomes even more striking during enlargement preparation.\textsuperscript{32}

Compared to Waldron and Kymlicka’s theories, the European Union is somewhere in the middle.\textsuperscript{33} Although it does not provide a fully-fledged minority protection mechanism, it does not exclude the possibility of institutionalizing minority protection and even recognizes it. Community Law in the sphere of minority protection might not be well-articulated, but it is certainly far from being “non-existent,” as Hughes and Sasse argue.\textsuperscript{34}

\textsuperscript{29} Id. at 763.
\textsuperscript{31} See Gaetano Pentassuglia, Minorities in International Law 27–29 (2002) [hereinafter Minorities in International Law].
\textsuperscript{32} See Norbert Rouland et al., Droit des minorites et des peuples autochtones 261–305 (2006); Roberto Toniatti, Minorities and Protected Minorities: Constitutional Models Compared, in Citizenship and Rights in Multicultural Societies 195, 205–12 (Michael Dunne & Tiziano Bonazzi eds., 1995).
\textsuperscript{34} Hughes & Sasse, supra note 12, at 2.
III. **Nondiscrimination, Special Rights and Albanian Schools**

International law has long recognized minority protection. According to an established practice, articulated by the PCIJ in the Advisory Opinion concerning minority schools in Albania, minority protection consists of two main components: non-discrimination on the one hand and special measures for minority protection on the other. Although these elements are certainly interconnected, their essence remains different.

In Europe, the Council of Europe (CoE) has been especially successful in dealing with these components, which play an important role in minority protection. The CoE legal system makes a rather successful attempt to combine both of them through the use of the Framework Convention for the Protection of National Minorities (Framework Convention) and the European Charter for Regional and Minority Languages, coupled with the nondiscrimination provisions of the European Convention on Human Rights (ECHR). Next to ECHR article 14, which has acquired new importance after the entry into force of Protocol 12 to the ECHR (making the self-standing use of the article

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37 Minority Schools in Albania, 1935 P.C.I.J. at 17.

38 Henrard, supra note 12, at 59; see also Will Kymlicka, *Introduction to The Rights of Minority Cultures* 1–29 (Will Kymlicka ed. 1995) (defending this position).


possible), and the case law of the European Court of Human Rights (Eur. Ct. H.R.), the Framework Convention and the Charter form the most developed international minority protection system to date, combining binding and nonbinding legal documents aiming at the creation of a well-regulated minority protection regime in Europe.

It is necessary to keep in mind, however, that simply focusing on equality without providing minorities with specific group rights is another approach consistent with the notion of democracy. In other words, the two-tier system of minority protection is desirable to protect fully the interests of the minorities, but there is no obligation in international law to institute such a system.

A. The European Union and the Nondiscrimination Part of the Standard

European Union law as it stands to date clearly gives an overwhelming priority to the nondiscrimination part of minority protection. This being said, it would be unfair to argue that this approach is a consequence of a particular doctrinal choice made by the Community. Unlike some of its Member States, such as France, the European Union has not defied the PCIJ’s position, but is simply not ‘mature’ enough in this respect to go further than Waldron’s nondiscrimination minimum. The first component of minority protection (i.e. nondiscrimination based on belonging to a minority) is incorporated into the Community legal order via the Race Directive based on article 13 of the EC Treaty and article 6(2) of the EU Treaty, in which reference to the ECHR is made, thus making a connection between article 14 of the ECHR and the principles of Community Law. Article 2 of the Directive states that “there shall be no direct or indirect discrimination based on racial or ethnic origin.” Article 14 of the ECHR prohibits discrimination on the grounds of “sex, race, colour, language, religion, political or

44 Nathan Glazer, Individual Rights Against Group Rights, in The Rights of Minority Cultures, supra note 38, at 123, 133; see also Waldron, supra note 27, at 752–57 (defending position similar to that of Glazer).
other opinion, national or social origin, association with a national minority, property, birth or other status.”

Read together, these provisions make it clear that nondiscrimination on the grounds of national origin or association with a national minority is elevated to one of the principles of Community Law.47 This legal framework is reinforced by article 21(1) of the Charter of the Fundamental Rights of the European Union (CFR).48 Article 21(1) of the CFR, which is based on the set of legal instruments outlined above, namely articles 14 of the ECHR, 6(2) of the EU Treaty, and 13 of the EC Treaty, reads as follows:49

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.50

Although the CFR is a “proclaimed” document having no binding force, its potential is illustrated by the references to its provisions made both by the ECJ51 and the Court of the First Instance (CFI).52 In other words, although not binding,53 the CFR plays a role in the Community legal system.54

47 See Hillion, supra note 12, at 718–21.
50 See generally Guido Schwellnus, “Much Ado About Nothing?” Minority Protection and the EU Charter of the Fundamental Rights (Const. Web Papers, No. 5, 2001), http://les1.man.ac.uk/conweb (Follow the “archive” hyperlink; then follow the “2001” hyperlink)(describing effects of provision on minority protection in European Union).
52 See Case T-177/01, Jégo-Quéré et Cie SA v. Comm’n, 2002 E.C.R. II-2365, ¶¶ 1, 42.
Thus, a number of provisions lay down the basis for, and are able to influence further development of, the principle of nondiscrimination on the ground of belonging to a national minority in Community Law. These provisions include articles 6(2) of the EU Treaty, 13 of the EC Treaty, 14 of the ECHR, and 21(1) of the CFR as well as Directive 2000/43/EC.

B. The European Union and the Special Rights Part of the Standard

The principle of nondiscrimination as included in article 14 of the ECHR, around which the Community approach discussed above is built, is narrower in scope than the Copenhagen criterion of “respect for and protection of minorities” because it does not include the second component of minority protection in light of the PCIJ’s Albanian Schools decision. The European Commission on Human Rights established that “[ECHR] does not compel states to provide for positive discrimination in favour of minorities.” It is just another argument denoting that a simple anti-discrimination approach rooted in article 14 of the ECHR hardly includes a possibility to adopt specific measures aimed at improvement of the situation in the sphere of minority protection. In other words, it does not “reach out to minority rights stricto sensu.” Even the ECJ’s active approach in several cases involving minorities, where the court viewed nondiscrimination as allowing for positive measures of minority protection, stating inter alia that “protection of a [linguistic minority] may constitute a legitimate aim” of state policy, did not change the general picture: the court is yet to establish national minority protection in a sense broader than simple nondiscrimination as a principle of Community Law.

55 See supra Section III.A.
60 See Rough Orientation, supra note 33, at 19.
One can outline a number of possibilities to include the second element of minority protection into the ambit of Community Law. Probably the most realistic is related to the use of the provisions of the EC Treaty dealing with culture. It has been argued that Title XII of the EC Treaty clearly implies that none of the Member States is culturally homogeneous, as article 151(1) of the EC Treaty states that “the Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity.” The Community is also obliged to “take cultural aspects into account in its action . . . in order to promote the diversity of cultures.”

Article 22 of the CFR also contains a reference to diversity, inspired by articles 151(1) and (4) of the EC Treaty. It includes cultural, religious and linguistic diversity, thus indirectly referring to the respect for minority rights. It is notable that the drafters of the CFR viewed article 22 as being rooted in article 6 of the EU Treaty, thus denoting that diversity is a constitutional principle of the European Union.

The EC Treaty not only requires the Community to “take cultural aspects into account in its action,” but also creates a climate “to promote culture” through establishing that aid in this domain is “considered to be compatible with the common market.”

Certain minority protection measures in the cultural sphere were in place even during the pre-Maastricht period. One such measure

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64 Treaty Establishing the European Community, 2006 O.J. (C 321E) 37, art. 151(4) [hereinafter EC Treaty].
65 See Explanation of Charter of Fundamental Rights, supra note 50, at 40. Declaration Number 11 to the Final Act of the Treaty of Amsterdam on the status of churches and non-confessional organizations is also mentioned among the provisions on which article 22 of the CFR was based. See id.; see also Draft Charter of Fundamental Rights of the European Union, CHARTE 4473/00, Oct. 11, 2000 (providing the explanatory notes of the praeidium).
66 See Rough Orientation, supra note 33, at 7 & n.50.
67 EC Treaty, supra note 64, art. 151(4).
68 Id. art. 87(3)(d).
69 Id. art. 87(3).
70 See Rough Orientation, supra note 33, at 12.
was Directive 77/486 of July 1977,\textsuperscript{71} concerning the education of migrant workers’ children—nationals of one of the Member States—in their mother tongue. It is questionable, however, whether this directive is really a minority protection tool because it is inspired by the economic free movement and does not protect the rights of migrant workers belonging to the national minorities.\textsuperscript{72} Although the classical approach to minority rights usually does not deal with the European citizens residing in a Member State other than their own, new studies adopt a somewhat more inclusive approach. Bruno de Witte was among the first scholars to ask the question “have the Member States of the EU become ‘national minorities?’”\textsuperscript{73}

A certain evolution is apparent from ECJ case law related to culture, which is particularly acute for minority protection. Martín Estébanez stresses the shift in the court’s reasoning from mainly relying on economic considerations to more cultural ones.\textsuperscript{74} Paying due respect to cultural rights, it is clear, however, that the court’s main case law concerning the elaboration of minority protection rights at the Community level is mostly related to nondiscrimination,\textsuperscript{75} which, as stated above, stops short of providing fully-fledged minority protection.

At present, the second component of the Albanian Schools minority protection standard is missing from Community Law. This situation does not prevent some scholars from being optimistic about the development of internal minority protection system within the European Union: “there seem to be already quite a number of building blocks in place on the basis of which a more explicit internal minority policy for the European Union could be developed if the necessary political will

\textsuperscript{72} “Economic free movement” is the freedom granted by article 39 of the EC Treaty to workers and their family members to reside and work anywhere in the Community on the basis of Community Law, not the law of the Member State of residence. It contrasted with “non-economic free movement” of other categories of European citizens (guaranteed by article 18 of the EC Treaty) which is much more restricted.
\textsuperscript{73} Politics v. Law, supra note 33, at 148; see Gabriel von Toggenburg, Minorities (…) The EU: Is the Missing Link an “Of” or a “Within”? , 25 EUR. INTEGRATION 273, 275–76 (2003). See generally Gabriel von Toggenburg, A Remaining Share or a New Part? The Union’s Role vis-à-vis Minorities After the Enlargement Decade (Eur. Univ. Inst., Working Paper No. 15, 2006), available at http://cadmus.iue.it/dspace/index.jsp (Follow the “Date” hyperlink; then select “2006”) (addressing minority protection in different contexts) [hereinafter The Union’s Role].
\textsuperscript{74} See Martín Estébanex, supra note 33, at 144, nn.32–33.
could be engendered.” The scope of internal EU protection of minorities is thus comparable to the nondiscrimination part of the CoE standard, but is slightly wider than that due to its expansion potential to cover special rights.

IV. INTERNAL AND EXTERNAL ASPECTS OF COMMUNITY ACTION: A MINORITY RIGHTS PARADOX

In light of the wording of article 6(1) of the EU Treaty, which does not explicitly include minority protection, the Copenhagen criterion dealing with respect for and protection of minorities has been called a “criterion which was not elevated to the nobility of Primary Law.” The observations related to the possible reasons why this has happened in such a way are numerous. It is clear that consensus concerning minority protection, as well as the political will to put such a system in place at the EU level is missing among Member States. This is illustrated by the problems related to the drafting and ratification of the CoE Framework Convention and the declarations adopted by EU Member States during this process. According to Bruno de Witte, “[T]he notions of ethnic minority and European Union seem, at the first sight, to belong to two different worlds.”

A. European Union External Dimension of Minority Protection

Looking closer, however, it is clear that “the respect for and protection of minorities” has definitely become a new principle of EU enlargement law, marking a long process of minority-related developments in the context of several enlargements.

Certain rules aimed at the protection of the local communities first appeared in the context of the first enlargement with a reference to the rights of Channel Islanders, Manxmen, and the residents of the Færøe...
Islands. Such measures, not being minority protection \textit{per se}, mostly limited the application of Community Law to these territories, with a goal of preserving local communities. In other words, they constituted a sort of "economic" minority protection, which was perfectly in line with the purely economic orientation of the Communities at that time.

At present, such minority protection measures can only be regarded with caution. Although they protect minorities, they also practically deprive the individuals belonging to the minorities of the part of Community Law rights they would otherwise enjoy by limiting the application of EU law to the inhabitants of these special areas. In one example, although the families granted settlement rights on Sark, the feudal fief in the hands of the seigneur of Sark and part of the bailiwick of Guernsey, were British citizens, they were not regarded as fully-fledged EU citizens because Community Law provisions relating to the free movement of workers and the free movement of services did not apply to them. Although some of these people see this as a blessing, others are annoyed by this \textit{de facto} discrimination and the inability to rely on the free movement of persons and services under EC law. To become fully-fledged EU citizens, the Sarkese, just as any other Channel Islanders or Manxmen, must reside in the United Kingdom for five years.

The \textit{de facto} discrimination in terms of free movement rights is even more acute given that the Channel Islanders as well as Manxmen fall within the scope of British nationality, as defined for purposes of
EU citizenship in Declaration number 2\textsuperscript{87} annexed to the EEC Treaty by the British Government. Point “c” of the Declaration makes an express reference to Manxman and Channel Islanders, making it clear that they are UK nationals for purposes of Community Law.\textsuperscript{88} In other words, the kind of minority protection as used in the Protocols to the 1972 Act of Accession is of dubious nature. While providing Minorities with special protection, it also strips them of some important rights.

A somewhat more usable standard of minority protection, including the protection of traditional occupations, culture, and linguistic diversity, first appeared in EU enlargement law during the fourth enlargement and dealt with the rights of the Sami people\textsuperscript{89} and, to a lesser extent, with the Swedish-speaking population of the Åland Islands.\textsuperscript{90} As a result of such measures, these minorities were, in the words of von Toggenburg, “[S]aved from unwanted effects of the Common Market.”\textsuperscript{91}

The principle of minority protection also acquired an immensely important role in the European Union’s enlargement-flavored external relations with the countries of Central and Eastern Europe after the end of the Cold War,\textsuperscript{92} especially through the protection of the “rights of persons belonging to minorities” clause of the Europe Agreements.

\begin{footnotes}
\item[89] See Protocol No.3 on the Sami People, Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on Which the European Union Is Founded arts. 1 & 2, 1994 O.J. (C 241) 352 [hereinafter 1994 Accession Act]. In relation to the rights of the Sami people, it is notable that Norway attached declarations to the Final Act of the Treaty of Accession reaffirming its commitment to respect the rights of the Sami people (with a particular reference to article 27 of the ICCPR) and declaring that Bokmal and Nynorsk should enjoy a status equal to Norwegian as the languages of the Communities. Final Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on Which the European Union Is Founded, § III(G)(38)–(39), 1994 O.J. (C 241) 395. Norway failed to join the European Union in the end as a result of negative outcome of a popular referendum on this issue.
\item[92] Wiener & Schwellnus, supra note 12, at 2.
\end{footnotes}
made with Central and Eastern European countries. In other words, minority protection formed part of EU enlargement law before the first release of Copenhagen-related documents. Yet, only the fifth enlargement allowed minority protection to acquire a "clear political and legal dimension." These developments notwithstanding, no clear minority protection clauses were included into the 2003 Treaty of Accession.

B. European Union Internal Dimension of Minority Protection

Although an established enlargement law principle, minority protection is far from being well-rooted within the Community. Internally, minority protection has only manifested itself at the Community level on two occasions, both of them accidental and not expressly aimed at minority protection. The first such occasion was the adoption of the EU Special Support Program for Peace and Reconciliation in Northern Ireland and the second was a Member States’ demarche against Austria after the inclusion of Jörg Haider’s FPÖ into the coalition government in 2000. The protection of minority rights was expressly mentioned during the crisis on a number of occasions, making scholars speculate that "the EU Member States and the EU institutions . . . would be opposed to any breach of inter alia minority rights by the Austrian government." Ironically, the report of the “three wise men” who had been sent to Austria to investigate the situation concluded that Austria "protects the existing minorities . . . to a greater extent than

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94 Rough Orientation, supra note 33, at 11.
95 von Toggenburg, supra note 91, at 24. The standards applied by the Commission to the assessment of minority protection in the candidate countries during the preparation of the fifth enlargement are assessed, infra Section V.
97 Although one can argue that the European Union did not play an important role in the Austrian crisis, the actions of the fourteen Member States were obviously coordinated and cannot be treated simply as the initiatives of the individual member states. See generally Matthew Happold, Fourteen Against One: The EU Member States’ Response to Freedom Party Participation in the Austrian Government, 49 INT’L & COMP. L. Q. 953 (2000); Michael Merlingen, Cas Mudde, & Urich Sedelmeier, The Rights to Be Righteous?: European Norms, Domestic Politics and the Sanctions Against Austria, 39 J. COMMON MkT. Stud. 59 (2001).
98 See Henrard, supra note 11, at 366; Schwellnus, supra note 50, at 21.
such protection exists in many other EU countries," thus failing to establish a link between the nature of the government in power and possible minority rights violations.

It is clear that the first example aimed at the establishment of peace and security, and the second dealt with democracy and human rights protection in the broadest possible sense. Neither of them really focused on minority rights, nor did they adopt any viable minority protection standard or go beyond mere political declarations. Minority protection only came as an unavoidable consequence of Community interference.

Although absent from the binding sphere of the acquis, minority protection is nevertheless well-rooted in the sphere of nonbinding acts and political declarations. The importance of minority protection in the European Community was asserted by the 1991 Luxembourg European Council, which adopted a Declaration on Human Rights. That declaration states that respect of the minority protection principle “will favour political, social and economic development.”

The European Parliament (EP) has also demonstrated its willingness to contribute to the minority protection debate at the EU level on several occasions. The EP put forward a number of initiatives to introduce minority protection into the texts of Treaties during every Treaty revision exercise, but these propositions were disregarded and none passed. Once again, consensus on this point appears to be missing among the Herren der Verträge.

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99 Martti Ahtisaari, Jochen Frowein, & Marcelino Oreja, Report to the European Court of Human Rights, § 29 (Sept. 8, 2000).


102 See Bruno de Witte, The European Community and Its Minorities, in Peoples and Minorities in International Law 179 (Catherine Brölmann et al. eds., 1992). We know from the history of European integration that proposals put forward by the EP have been followed on a number of occasions, though with considerable delay. The possibility to combat discrimination on the grounds of ethnicity, racial origin or belonging to a national
C. The “Officers’ Maxim” Applied (The Paradox)

Thus, with the exception of a number of political declarations, the idea of minority protection going beyond simple non-discrimination has failed to get to the Community level and enter the scope of the *acquis communautaire*, in order that it may have an internal grip on Member States.103 Such a limited role of minority protection within the European Union does not, however, exclude possible developments in this field.104 Although pessimistic, it is nevertheless highly unlikely that minority protection will become a matter of large-scale EU involvement in the near future as “there remains an evident lack of competence, i.e. mandate provided by the Treaty’s High Contracting Parties, regarding ethnic or linguistic minorities.”105 A minority protection standard common to EU Member States is also missing.106 All this threatens to turn EU pre-accession promotion of minority rights into “measuring progress in the absence of benchmarks.”107

A paradox is evident: an all too powerful principle of EU enlargement law is not at all important internally.108 Even the absence of minority protection from the *acquis* and the non-existence of a common Member States’ standard in the field did not prevent the Community (and especially the Commission) from giving minority protection full priority over other issues during the pre-accession progress assessment exercise.109

That is to say, just as with general human rights protection,110 minority protection is an instance in which the difference between “in-

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104 See *The Union’s Role*, *supra* note 73, at 27.
105 See *Rough Orientation*, *supra* note 33, at 2.
109 See Maresceau, *supra* note 6, at 16.
ternal” and “external” EU action is crucial. Taking minority protection requirement as an example, one can argue that “in the context of pre-accession, the constitutional principle of ‘conferral of powers’ does not apply.”

The gap between internal and external EU minority protection regulation is especially acute after the fifth enlargement, which has only broadened this “political lacuna,” effectively separating external demands addressed by the Community to the new-comers and the internal protection of minorities within the Community.

This gap can give rise to a number of far-reaching problems. Clearly, the European Union lost its competence in the field of minority protection after accession became a fact: pre-accession strategy ceased to apply, as did the Copenhagen political criteria. Moreover, the EU minority protection system is practically nonexistent and fails to provide a reasonable degree of protection. Thus, in order for the European Union to achieve some results in the sphere of minority protection, all minority protection reform in the candidate countries should be completed before, not after the enlargement. Viewed from this perspective, minority protection is distinct from all elements of the Copenhagen criteria falling within the scope of the *acquis* because compliance with the latter is tested only after accession, and EU involvement remains high. This observation also helps explain the high level of attention the Commission pays to monitoring candidate countries’ compliance with the minority protection criterion, as outlined at Copenhagen.

Thus, although minority protection in the context of enlargement includes both components of minority protection, the European Union’s “internal” minority protection is based purely on nondiscrimination, thus covering only half of the standard as outlined in the PCIJ’s *Albanian Schools* case and Kymlicka’s writings. Although a theoretical

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111 Van der Meulen, *supra* note 12, at 5; Schwellnus, *supra* note 50, at 1.
113 See Hillion, *supra* note 12, at 716.
115 Although ready to discuss minority languages protection in the candidate countries, the Commission is not ready to give a clear answer to the question regarding protection of minority languages in France. See Written Question 963/98, 1998 O.J. (C 310) 150.
116 For an argument for the continuation of minority rights monitoring after enlargement, see Hoffmeister, *supra* note 45, at 105.
117 See, e.g., EC Treaty, *supra* note 64, arts. 226-228, 234.
posibility of embracing the whole approach can, in principle, be found in the body of Community Law, the political will to move in this direction is missing. This picture becomes even more complicated if one scrutinizes the EU standards employed during the pre-accession assessment of the candidate countries’ adherence to the minority protection criterion.

V. PRE-ACCESSION ASSESSMENT: IS ESTONIA REALLY SO DIFFERENT FROM SLOVAKIA?

Based on the texts of the Copenhagen-related documents, one can develop a classification of the Commission’s approaches to addressing minority protection in different candidate countries. A number of approaches emerge.

For some countries, the issue of minority protection was less acute due to a lack of a significant minority population. The Commission adopted an inclusive approach to monitoring minority protection among the candidate countries, and did not specify any minimum minority population necessary for country monitoring in this field to begin. Nevertheless, the Commission has been reproached for expressly withdrawing from the assessment of the minority situation in some of the candidate countries, Poland is the most telling example of such a practice. The Commission did not even criticize the fact that Poland was one of the last among the Central and Eastern European countries to ratify the CoE Framework Convention. It appears that in some candidate countries, conditionality of minority protection during preparation for the fifth enlargement was almost not applied, or was only applied at a rudimentary level, compared to other candidate countries.

It is difficult to establish with certainty the exact sizes of minority populations in the countries of Central and Eastern Europe. The statistical data concerning minority population in that region has been called a “great illusion.” Although minority population data can pro-

118 See Hughes & Sasse, supra note 12, at 14 (making distinction between Roma and Russian-speaking minority versus all other minorities).
119 See infra note 136. Even the situation of tiny minorities, such as Csango in Romania, was monitored. See id.
120 See Wiener & Schwellnus, supra note 12, at 21–28; see also Vermeersch, supra note 12, at 18–21.
vide a frame of reference, it is far from reality.\textsuperscript{123} This issue is especially acute in the case of Roma populations;\textsuperscript{124} it equally concerns all the candidate countries, acceding states and the (new) Member States. It is clear, however, that in countries that joined the European Union in 2004 and 2007, millions of people are discriminated based on their belonging to a minority group.

Judging both by the substance and structure of the Copenhagen-related documents concerning minority protection in the countries that joined in 2004 and 2007, considered by the Commission as problematic, one sees two distinct groups of states. The Commission’s approach to them appears to be different, which substantiates the claim that “[minority protection] conditionality varies greatly across accession states.”\textsuperscript{125} Despite a simple non-inclusion of the issue of minority protection in the Copenhagen-related documents, released in the context of some candidate countries’ pre-accession process, the Commission did not formulate a single approach for all candidate countries where this issue was assessed.\textsuperscript{126}

The first group of candidate countries included Bulgaria,\textsuperscript{127} Romania,\textsuperscript{128} Slovakia,\textsuperscript{129} Hungary,\textsuperscript{130} the Czech Republic,\textsuperscript{131} and, among the

\textsuperscript{122} For some statistical estimates, see \textit{id.} at app. II.


\textsuperscript{124} Wiener & Schwellnus, \textit{supra} note 12, at 15.


\textsuperscript{130} See, e.g., Vermeersch, \textit{supra} note 12, at 15–17.
present-day candidate countries, Croatia.\textsuperscript{132} The Copenhagen-related documents concerning minority protection in these countries did not contain any special substructure and dealt with a number of minorities, mostly concentrating on the situation of the Roma,\textsuperscript{133} ethnic Hungarians\textsuperscript{134} (mostly in Slovakia and Romania), and ethnic Turks (in Bulgaria).\textsuperscript{135} A number of smaller minority groups were also mentioned (e.g., the Csango minority in Romania).\textsuperscript{136} While dealing with these countries, the Commission advocated wider inclusion for the minority population, respect and support for minority cultures, introduction of education in minority languages (including higher education for some minority groups), and never criticized the grant of cultural autonomy.\textsuperscript{137} A special emphasis was made on the issue of nondiscrimination on the ground of belonging to an ethnic minority.

The second group of countries was considerably smaller and included Latvia and Estonia. The Copenhagen-related documents concerning the state of minority protection in those countries adopted a special structure, different from that contained in the Copenhagen-related documents dealing with the first group. The discussion focused on the situation of the “Russian-speaking” minority,\textsuperscript{138} although,


\textsuperscript{135} See Zhelyazkova, \textit{supra} note 127, at 62–66.

\textsuperscript{136} By mentioning this particular minority in the Regular Reports, the Commission followed the Parliamentary Assembly of the Council of Europe. See Eur. Parl. Ass., \textit{Recommendation 1521: Csango Minority Culture in Romania} (May 4, 2001).


just as in the previous group, a number of other minorities were also discussed. In the context of Estonian and Latvian applications for accession, the Commission relied heavily on the CoE findings\textsuperscript{139} as well as on the findings of the Organization for Security and Co-operation in Europe (OSCE),\textsuperscript{140} and was backing developments drastically different from the demands addressed to candidate countries in the first group. Concerning the OSCE’s role, it has been argued that the European Union has “delegated to the High Commissioner on National Minorities (HCNM) the task of judging whether [the candidate countries] have ‘done enough’ in terms of minority rights.”\textsuperscript{141} The references to the OSCE position are contained both in the Europe Agreements with Estonia and Latvia\textsuperscript{142} and in the Accession Partner-
making the HCNM’s recommendations de facto enforceable law in the context of enlargement.

The Commission focused on a number of negative developments in the field of minority rights in these countries, but ultimately tolerated established discrimination against minority groups in Latvia and Estonia. Unfortunately, the Commission mostly concentrated on the instances of discrimination that were in blunt contradiction with the obligations stemming from the Europe Agreements made with Estonia, particularly “in the fields of free movement of persons, right to establishment, supply of services, capital movements and award of public contracts.” In other words, the market-oriented nature of the European Union prevailed. There was little criticism of the policy of assimilation of the minority population and the exclusion of minorities from many spheres of life, which resulted in the marginalization of minorities—a reality in the countries of the second group. The policy of the countries in question, which the Commission tolerated, amounted to attempts to trigger exclusion and, eventually, the emigration of minorities. This approach was on its face contradictory to the spirit of inclusion and tolerance the Commission promoted in the first group.

Adopting different approaches to minority protection depending on the countries in which the assessment was conducted, and a particular minority in question, is not in accord with the pre-accession principle of conditionality that consisted of the objective assessment of all candidate countries’ progress based on the same criteria. Moreover, even within each of the groups, the Commission’s approach to

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143 The Accession Partnership with Latvia does not mention the OSCE findings directly; however, the Accession Partnership, makes a reference to acting “in line with the principle of proportionality, international standards and the Europe Agreement.” See Council Decision 2002/88, 2002 O.J. (L 44) 45, 47; see also Council Decision 2002/86, 2002 O.J. (L 44) 29, 31 (making reference, in Accession Partnership with Estonia, to acting “in line with both international standards and the Europe Agreement and respects the principles of justified public interest and proportionality”).


145 See infra Sections V. C–G.

Ethnic Minority Protections in the EU

...minority protection differed from country to country. Different degrees of pressure and scrutiny were applied.\footnote{For the differences in the Commission’s analysis of Poland, Hungary and Romania, see Wiener & Schwellnus, supra note 12, at 15.}

The main differences between the Commission’s approaches to the assessment of minority protection in the countries belonging to the first and the second group concerned the following issues:

- Structural approaches to minority rights assessment;
- Naming the minorities concerned;
- Different approaches to the link between belonging to a given minority and the citizenship of a country in question;
- Different approaches to minority education in both groups;
- Different approaches to nondiscrimination in both groups;
- Different approaches to minority self-government in both groups;
- Different approaches to the political rights enjoyed by minorities in both groups.\footnote{This list is not exclusive and is drafted solely to provide an example of the varied approaches to minority protection used by the Commission.}

A. Two Groups of Countries and the Structure of the Copenhagen-Related Documents

Although the Commission built approaches to the integration of the Russian minorities in Estonia and Latvia and the minorities in other candidate countries along totally different lines, this difference was not reflected in the structure of all the Copenhagen-related documents. It would have been naïve to expect the Commission to introduce into the regular reporting exercise such a differentiated treatment of minorities already at the structural level; this would be in blunt disaccord with the principles of enlargement law, making all the reasonable claims for predictability of the enlargement process irrelevant.\footnote{Scholars argue that by and large the introduction of the principle of conditionality and its subsequent application did not make the enlargement process more predictable and clear. See, e.g., Christophe Hillion, Enlargement of the European Union: A Legal Analysis, in Accountability and Legitimacy in the European Union 401, 402 (Anthony Arnull & Daniel Wincott eds., 2002); cf. Kochenov, supra note 3, at 300–11.} Although the twotier structure of the problematic countries is not articulated in the structure of the Copenhagen-related documents, such as composite...
and strategy papers, the same cannot be said about the structure of the Commissions regular reports.\footnote{150}

The composite and strategy papers’ approach to the issue is unsystematic. The 1998 Composite Paper tackles three main issues concerning minority protection: the situation in Latvia and Estonia; the situation with Roma; and the situation of Hungarian minorities in Romania and Slovakia.\footnote{151} One can find a similar structure of the assessment of the candidate countries’ progress in other papers as well. The 1999 Composite Paper notes the progress with the handling of minority protection in Estonia and Slovakia, discusses the need of “finding the right balance between legitimate strengthening of the state language and the protection of minority language rights,”\footnote{152} and the situation with Roma and Hungarian minorities. The 2001 Strategy Paper narrows the minority protection assessment to two main issues: the situation in Latvia and Estonia and the protection of Roma rights.\footnote{153} The 2002 Paper’s structure puts a dividing line between the issues of Roma protection and minority protection—the latter includes all other minorities.\footnote{154}

Overall, the composite and strategy papers do not provide clear guidance through minority protection particularities, and limited to inconsistently hand-picking certain issues while failing to see the larger picture.\footnote{155} This demonstrates an approach similar to that the Commission adopted during the pre-accession assessment of democracy and the rule of law in the candidate countries.\footnote{156}

\footnote{150}For the structure of the whole body of the Copenhagen-related documents, including documents released in implementation of the conditionality principle of the Copenhagen criteria, see Kochenov, supra note 11, at 5–7.


\footnote{156}See sources cited supra note 155.
A different picture is observed through study of the regular reports. Dealing with the second group of countries, the Commission applies a specific “naturalization-oriented” structure of the reports, including subheadings dedicated to the issuance of residence permits and granting citizenship to the members of the minority communities. Thus, all the regular reports dealing with the second group of countries were structurally different from those dealing with the first group. The structure the Commission introduced was mainly threefold, including:

1. A naturalization procedure;
2. Residence permits and special passports for non-citizens; and
3. The integration of minorities.\(^{157}\)

Several regular reports also contained a subchapter on linguistic legislation.\(^{158}\) It is clear from this structure that the Commission shifted the accents in its assessment of minority protection in Latvia and Estonia, compared to the minority protection in the first group. Predictably, there was considerable difference in the substantive approach to the minority protection assessment between the countries in the first and second groups.

B. Different Definitions of “Minority” Applied in the Two Groups

As in international law, in which there is no consensus concerning the definition of “minority,” the Commission gave “minority”\(^{159}\) a meaning that differed considerably from the definition adopted in scholarly literature.\(^{160}\) Moreover, the Commission’s definitions for the first and the second groups of countries differed considerably.


\(^{160}\) See Henrard, \textit{supra} note 12, at 367–70; Mullerson, \textit{supra} note 14, at 807; Schulte-Tenckhoff & Ansbach, \textit{supra} note 35, at 17; Valentine, \textit{supra} note 159, at 463.
A definition of “minority” is nowhere to be found in the Copenhagen-related documents, leaving it to the candidate countries to determine whom the Commission was asking them to respect and protect. Several peculiar features of the Commission’s understanding of the term follow directly from the Opinions and regular reports.

First, the Commission’s notion of “minority” used in the majority of the Copenhagen-related documents is limited to national minorities, thus excluding a whole range of other minority groups that might otherwise deserve protection. It is true that the Commission addresses the rights of some other minority groups, like religious and sexual minorities, in sections of the Copenhagen-related documents dedicated to other groups of rights.\footnote{161 See, e.g., \textit{Democracy and Human Rights}, \textit{supra} note 155, n.88 (demonstrating that sexual minorities were not dealt with in the minority rights sections of the Commission’s reports). Religious minorities were dealt with in the context of assessment of the “freedom of religion,” which also falls outside of the “Minority Protection” sections of the Copenhagen Related documents. \textit{See, e.g., Comm’n of the Eur. Cmtys., Regular Report on Romania’s Progress Towards Accession, at 21 (2000), available at http://ec.europa.eu/enlargement/archives/key_documents/reports_2000_en.htm.} Religious minorities were dealt with in the context of assessment of the “freedom of religion,” which also falls outside of the “Minority Protection” sections of the Copenhagen Related documents. \textit{See, e.g., Comm’n of the Eur. Cmtys., Regular Report on Romania’s Progress Towards Accession, at 21 (2000), available at http://ec.europa.eu/enlargement/archives/key_documents/reports_2000_en.htm.}} At the same time, it is surprising that the Commission never used the term “national” or “ethnic” minorities in the regular reports, insisting on a broader term “minority” that might appear misleading. It is worth noting here that article 27 of the International Covenant on Civil and Political Rights (ICCPR) distinguishes between at least three kinds of minorities: ethnic; linguistic; and religious.\footnote{162 \textit{See} \textit{Valentine, supra} note 159, at 455.} The CoE Framework Convention adopts a slightly different approach, talking about national minorities without specifying this term.\footnote{163 \textit{See} \textit{Gilbert, supra} note 139, at 55.}

By taking such an ill-articulated view of minorities, the Commission did not necessarily act in accordance with a definition of minorities used by other Community institutions. The EP, for example, called for laying “particular stress on the rights of minorities (ethnic, linguistic, religious, homosexual, etc.) at the time of enlargement negotiations.”\footnote{164 \textit{See} Eur. Parl. Comm. on Civil Liberties & Internal Affairs, Annual Report on Respect for Human Rights in the European Union, \textit{Eur. Parl. Doc.} AI–0468/98, ¶ 10 (1997) (also known as the Schaffner Report).}

Second, there is certainly some confusion in the way the Commission named the minorities whose situation it monitored. It downgraded the importance of some minorities by defining them differently from other minority groups in similar situations. Talking about a Hungarian minority living in Slovakia or Romania, the Commission...
used the term “Hungarian minority,” though in discussing minorities in Estonia and Latvia the term was “Russian-speaking minority.” The denomination of what kind of minority is dealt with in the regular reports is of crucial importance and can have considerable implications on the strategy and practice of minority protection. The term “Russian-speaking minority” is arguably narrower in meaning (and also might be interpreted to demand a different scope of protection compared to other minority groups assessed by the Commission) than Russian minority. The latter, also including linguistic rights, puts equal emphasis on culture and group identification based on common history, and values, and is not limited to linguistic factors. Thus, in the context of the two groups outlined supra, the Commission started differentiating between minorities in Latvia and Estonia on the one hand and minorities in the second group on the other by defining “minorities” differently.

C. Minorities and Citizenship: Different Approaches in the Two Groups

The Commission behaved wisely by refusing, on several occasions, to follow the definitions adopted in a given candidate country, thereby trying to look into the substance of the issue of minority protection. This issue was particularly acute for the second group of countries, Latvia and Estonia, for example, were eager to make a connection between minority status and national citizenship, thus excluding all non-citizens living (and often born) in their territory from the scope of application of the minority protection criterion. Unlike in the other “states that emerged from the collapse of the Soviet Union [and] chose a ‘zero option’ for citizenship, by which all permanent residents were granted citizenship without naturalization,” huge portions of the permanent

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167 von Toggenburg, supra note 91, at 9.

168 Lowell Barrington, The Making of Citizenship Policy in the Baltic States, 13 Geo. Imigr. L.J. 159, 166 (1999). It is notable that the 1991 Treaty on the Principles of the Interstate Relations, between the RSFSR (as Russia was then called) and Estonian Republic, was the first step to a similar solution. In Article 3.1, this treaty offered the minorities a choice of either Estonian citizenship or citizenship of the RSFSR. At the same time, Article 3.3
population of Latvia and Estonia were not granted citizenship rights after the dissolution of the Soviet Union, and thus remained stateless.169

In dealing with the countries of the second group, the Commission did not allow such a narrow reading of “minority” to become the starting point of the pre-accession assessment. The Commission pointed out in the Opinions on the Latvian application for EU membership that the assessment of minority protection should be made solely based on the de facto situation. “[R]egardless of the nationality held and difference in personal status arising from non-possession of Latvian nationality.”170 One finds an almost identical wording in the Commission’s Opinion regarding Estonia’s application.171 The Commission has consistently followed the same approach in the regular reports that followed.172 Such a constructive approach to the definition of minorities in the context of these two countries’ pre-accession progress resulted in some mild changes in the naturalization policy adopted in Latvia and Estonia.173 The Commission stopped short of capitalizing on the achieve-

imposed an obligation to reach a special agreement regarding citizenship issues, but such an agreement has never been reached concluded. The Treaty was ratified by the Supreme Soviet of the Republic of Estonia on January 15, 1991. See Vedomosti Estonskoj Respubliki 1991, No. 2. The Treaty was ratified by the Supreme Soviet of the RSFSR on December 26, 1991. See Vedomosti RSFSR 1992, No. 3.


172 Id.

ments stemming from the inclusive definition of minorities for the purposes of the pre-accession assessment. Consequently, this approach, although beautiful on paper, only brought meager results, leaving much to be desired.

Although not resulting in any sweeping changes, the Commission’s move was, legally speaking, significant because for the first time, the candidate countries’ naturalization policies were influenced by EU pre-accession pressure, which has only limited powers in this domain.174 In any other context, the Member States are free (albeit without discrimination between those falling within the scope of their citizenship once it has been outlined,175 and with “due regard to Community Law”)176 to decide who their citizens are.177 Thus, starting in 1997 the Commission adopted a “realistic” or “inclusive” approach to the assessment of minority protection in these candidate countries.178

The Opinions on the Application for Membership released by the Commission on July 15, 1997 enable one to assess the scope of the problem. According to the Estonian Opinion, “Around 35% of the population of Estonia consists of minorities, including non-citizens, . . . Of that 35%, a group of 23% (numbering around 335,000, mainly of Russian origin) are not Estonian citizens.”179 The Latvian Opinion states that “[i]n Latvia, minorities, including non-citizens, account for nearly 44% of the population. . . . Latvians are a minority in 7 of the country’s 8 largest towns. Within that 44%, 28% of the population, i.e. some 685,000 people, does not have Latvian citizenship and a large propor-

177 Declarations on this matter were made by Germany (attached to the EEC Treaty) and by the United Kingdom (attached first to the 1972 Treaty of Accession by the United Kingdom to the European Communities and, later, in light of a new Nationality Act, the United Kingdom made a new declaration on the definition of the term “nationals” on January 28, 1983). See Case C-192/99, The Queen v. Sec’y of State for the Home Dep’t. ex parte Kaur, 2001 E.C.R. I-1237. For an overview, see Stephen Hall, Determining the Scope ratione personae of European Citizenship: Customary International Law Prevails for Now, 28 Legal Issues of Econ. Integration 355 (2001) (commenting on the Kaur case).
179 Commission Opinion on Estonia’s Application, supra note 171, at 18.
tion of that group, consisting of the former citizens of the USSR, has no citizenship at all.\(^{180}\) To summarize, in its assessment of nationality policies, the Commission dealt with the legal status of over one million people, making up a considerable share of the population of the candidate countries belonging to the second group.

The candidate countries themselves considered the persons in possession of foreign or no nationality as not being part of the minority population.\(^{181}\) Consequently, applying this logic to Latvia and Estonia, the Copenhagen criterion of “respect for and protection of minorities” was not applicable to the situation of these people and, as a result, could not affect the Latvian and Estonian applications for EU membership. One illustration of this point is Estonia’s definition of “minority” during ratification of the CoE’s Framework Convention.\(^{182}\)

The Estonian government declared that:

Estonia understands the term “national minorities” as follows—*Citizens of Estonia* that

- (a) reside on the territory of Estonia;
- (b) maintain longstanding, firm and lasting ties with Estonia;
- (c) are distinct from Estonians based on their ethnic, cultural, religious or linguistic characteristics;
- (d) are motivated by a concern to preserve together their cultural traditions, their religion or their language, which constitute the basis of their common identity.\(^{183}\)

The Commission dismissed such a citizenship-centered definition as “not relevant.”\(^{184}\)

The Commission applied the inclusive vision of minorities only to Latvia and Estonia. The first group of countries was analyzed based on the assumption that persons belonging to a minority hold a nationality of the state in which they reside. To illustrate a difference between the two approaches to minority definition, consider the Czech definition of

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\(^{180}\) Commission Opinion on Latvia’s Application, *supra* note 170, at 18.

\(^{181}\) See infra text accompanying notes 183 & 185.

\(^{182}\) See generally *Framework Convention*, *supra* note 39.

\(^{183}\) See *Estonia, Framework Convention Country Specific Information*, http://www.coe.int/t/e/human_rights/minorities/Country_specific_eng.asp#P429_22520 (last visited Jan. 17, 2008) (emphasis added). Estonia ratified the Convention on January 6, 1997. *Id.* These declarations are not new—Germany and Luxembourg, for example, made similar declarations while signing the Convention. See generally *id.* (containing information on all declarations made by States at ratification).

\(^{184}\) Commission Opinion on Estonia’s Application, *supra* note 171, at 18.
minorities, cited by the Commission. The Czech Law on the Rights of National Minorities defined minorities as “a group of citizens of the Czech Republic living on the current territory of the Czech Republic that differentiate themselves from the rest of the citizens, and though their ethnic, linguistic and cultural origin, create a minority that at the same time wish to be considered a minority.”\footnote{Comm’n of the Eur. Cmtnys., Regular Report on the Czech Republic’s Progress Towards Accession, at 25 (2001), available at http://ec.europa.eu/enlargement/archives/key_documents/reports_2001_en.htm (emphasis added).} The Commission, moreover, actively participated in the drafting of minority protection legislation in the Czech Republic (a pre-accession advisor participated in the drafting process as part of the twining program).\footnote{See Mahulena Hofmann, The 2001 Law on National Minorities of the Czech Republic, 1 Eur. Y.B. of Minority Issues 623, 624 (2001).} Thus, the Commission knowingly approved of such a definition. This definition is also used in the law of the CoE, thus, influencing the legal systems of all European states.\footnote{See John R. Valentine, Towards a Definition of National Minority, 32 Denver J. Int’l. L. & Policy 445, 460–66 (2004).} It has been noted that such an approach is probably not in line with ECJ case law,\footnote{See Wiener & Schwellnus, supra note 12, at 33. For general information on the principle of nondiscrimination based on nationality in EC law, see generally Gareth Davies, NATIONALITY DISCRIMINATION IN THE EUROPEAN INTERNAL MARKET (2003).} which grants a possibility to benefit from the minority protection norms adopted by a Member State not only to citizens, but also to residents\footnote{See Case 137/84, Ministère Public v. Mutsch, 1985 E.C.R. 2681.} and visitors (as long as they are EU citizens or long term residents in the sense of Directive 2003/109/EC of course).\footnote{See Bickel & Franz, 1998 E.C.R. I-07637, ¶ 31.}

In other words, the Commission asserted its right to apply the Copenhagen minority protection criterion to both citizens and foreigners (or stateless persons) residing in the candidate countries only while dealing with Estonia and Latvia. It is notable that there is no principal consensus in the scholarly literature on the topic concerning the notion of minority or the necessity of a link between minority status and citizenship.\footnote{See Carmen Thiele, The Criterion of Citizenship for Minorities: The Example of Estonia 1 (Eur. Ctr. for Minority Issues, Working Paper No. 5, 1999), available at http://www.ecmi.de/download/working_paper_5.pdf; see also Pentassuglia, supra note 31, passim.} Although it is often argued that citizenship is a necessary precondition to recognition as a minority,\footnote{See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities ¶ 569, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1979) (prepared by Francesco Capo-}
Likewise, it is impossible to find a clear solution to this problem in the main international legal instruments. One commentator notes that the Human Rights Committee established by article 28 of the ICCPR recognized that “all members of an ethnic, religious or linguistic minority are granted minority rights, no matter whether they possess the citizenship of the state or not.”\textsuperscript{194} Neither does the Framework Convention contain any reference to citizenship. This does not help because it does not contain any definition of minority, which would prove that citizenship is not among the necessary requirements to be treated as a minority. The PCIJ did not include a citizenship requirement in its minority definition.\textsuperscript{195} The European Charter for Regional and Minority Languages, on the other hand, contains an explicit citizenship requirement for minorities.\textsuperscript{196} Overall, “The European regional system considers citizenship as a necessary precondition for membership of a legally protected minority.”\textsuperscript{197} From this standpoint, the Estonian Declaration attaching minority status to the citizenship of Estonia is in the mainstream of legal development in the field of legal definition of minorities, which makes the Commission’s position almost revolutionary.

Notwithstanding the innovative nature of the Commission’s move toward an inclusive approach to minority definition, the new understanding of who should qualify as a minority in Estonia and Latvia clearly did not change the approach toward minorities adopted in these particular countries. The 2002 Estonian Report underlined that Estonia gave too narrow a definition to minorities,\textsuperscript{198} adding, however, that Estonia adopted a more inclusive approach in practice.\textsuperscript{199} Moreover, such a discrepancy in the definition of who is a minority within

\textsuperscript{194} See U.N. Human Rts. Comm’n, General Comment No.23(50) on Article 27/Minority Rights, ¶ 5.1, U.N. Doc. CCPR/C/21/Rev. 1/Add. 5 (Apr. 26, 1994); Thiele, supra note 191, at 3.

\textsuperscript{195} See The Greco-Bulgarian “Communities,” 1930 P.C.I.J. (ser. B) No. 17 (July 31, 1930).

\textsuperscript{196} See Petra Roter, Managing the ‘Minority Problem’ in the Post—Cold War Europe Within the Framework of a Multilayered Regime for the Protection of National Minorities, 1 EUR. Y.B. Of Mi- nority Issues 85, 106 (2001); Thiele, supra note 191, at 21.

\textsuperscript{197} See Petra Roter, Managing the ‘Minority Problem’ in the Post—Cold War Europe Within the Framework of a Multilayered Regime for the Protection of National Minorities, 1 EUR. Y.B. Of Minor- ity Issues 85, 106 (2001); Thiele, supra note 191, at 21.

\textsuperscript{198} Id. at 31 n.8.
the scope of the Copenhagen political criteria demonstrated clearly
that no single approach was used by the Commission during the pre-
accession monitoring exercise. This, yet again, undermined the pre-
accession rhetoric of a single and fair standard equally applicable to
all candidate countries.

As Chief Justice Earl Warren famously stated in Perez v. Brownell,
“Citizenship is man’s basic right, for it is nothing less than the right to
have rights.”200 In the context of the Russian speaking minority in Lat-
tvia and Estonia, the problem of statelessness is aggravated by the fact
that, by having a stateless status, huge portions of the population of
these states are de facto prevented from acquiring the nationality of
the Baltic States in question and EU citizenship, derivative thereof,
by virtue of strict ethnocentric policy of the states belonging to the sec-
ond group. Low naturalization rates in the second group (particularly
Latvia) are telling in this regard,201 inviting speculation about ineffect-
ive and discriminatory policy choices in these countries. To claim
certain limited community rights, members of minority groups, unless
they are family members of Community citizens, can only rely on Di-
rective 2003/109/EC.202

D. Different Approaches to Minority Education in the Two Groups

Putting the fight for school desegregation aside (which is too
complicated an issue for this Article)203 the Commission’s approach to
education of minorities is also inconsistent. Although one minority
should have a university, other minorities lose their rights to school-
ing in their language.204 In the context of the “Russian-speaking” mi-

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201 See Hughes, supra note 146, 751 (providing statistics on naturalization rates).
who are Long-Term Residents, 2003 O.J. (L 16) 44.
203 Especially given the recent controversial case law of the Strasbourg human rights
No. 57325/00 (2006). For a discussion of this case, see generally Claude Cahn, The Ele-
phant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Hu-
eu/employment_social/fundamental_rights/pdf/legnet/06lawrev4_en.pdf.
204 See, e.g., Jack Greenberg, Brown v. Board of Education: An Axe in the Frozen Sea of Racism,
and the United States); Matthew D. Marden, Return to Europe? The Czech Republic and the EU’s
Rts. Ctr., A Special Remedy: Roma and Schools for the Mentally Handicapped in the Czech
norities, *de facto* assimilation is stressed, while the Commission’s principles concerning the Hungarian minority are absolutely different.205

The Commission followed the developments related to the amendment of the Law on Education in Romania to create a Hungarian-German University.206 This university was not supposed to become the only institution of higher education in Romania operating in minority languages because Hungarian is used at a number of departments of state universities in that country.207

The developments in Latvia and Estonia reveal that the prohibition or limitation of teaching in the minority language is considered an organic part of the promotion of the state language. In Estonia, Russian schools get State funding.208 The Law on Basic and Upper Secondary Schools, however, only allows for forty percent of teaching to be done in a language other than Estonian starting in 2007,209 which is clearly contrary to the Commission’s position in the Opinion on the Estonian Application for EU Membership. There, the Commission recommended that education in Russian language “should be maintained without time limit in the future.”210 Latvian education law insists that all minority schools choose a bilingual program.211 Minority school teachers not proficient in Latvian are subject to dismissal.212 According to the 2000 Latvian Report, by 2004 “all state funded schools will provide sec-

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205 Van der Meulen, *supra* note 12, at 7.


212 Id.
ondary education (from 10th grade onwards) in the state language only"; thus, the law is effectively prohibiting education in the native language of forty-four percent of the population.\textsuperscript{213} Strikingly, in response to this development the Commission stated that "[t]he Language Law and implementing regulations . . . essentially comply with Latvia’s international obligations."\textsuperscript{214} The Commission’s position is difficult to explain, as the approval of the Latvian policy banning Russian language from schools is clearly contrary to the Commission’s minority protection guidelines for the first group of countries, in which education in the minority language is supported and safeguarded. Scholars regret that “under the present situation there seem to be no clear grounds to obstruct the implementation of the Latvian Education Law.”\textsuperscript{215}

Although the Commission supported Hungarians in Romania schooled in Hungarian in establishing a university in their own language, the Russian minority schools in the second group of countries are being closed; the Commission did not take issue with this during pre-accession.

E. Different Approaches to Nondiscrimination on the Grounds of Belonging to a Minority in the Two Groups

In the first group of countries, unlike in the second, the Commission was attentive to minority representation in Government and the police, as well as to the organization of minority self-government. Importantly, minority participation, as promoted by the Commission during the pre-accession process, was intended to reach up the hierarchy of army and administrative personnel.\textsuperscript{216}

The Commission also monitored with great care access to the labor market in general, especially regarding discrimination concerning the Roma minority. Notwithstanding the efforts of the Commission and the countries of the first group, \textit{de facto} discrimination flourished.\textsuperscript{217}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{214} Id. at 97.
\item \textsuperscript{215} See \textit{Russian Speaking Minorities}, supra note 208, at 15.
\end{itemize}
\end{footnotesize}
A different situation arose in the context of promoting nondiscrimination in the second group of countries. Judging by the Commission’s Reports and Opinions it is possible to conclude that the Commission only regarded the Russian minority in Latvia and Estonia as a linguistic minority. In the course of the pre-accession process, the Commission gave overwhelming priority to the measures related to teaching minorities Latvian and Estonian. All the Accession Partnerships focused on the same issue and the PHARE funding was used for the program. Thus, language teaching seems to be regarded, by the States of the second group and the Commission, as the main tool of integration and promotion of nondiscrimination.

Viewed from a legal perspective, such an approach is problematic because the Commission, in its Reports, does not draw a line between integration and assimilation, and arguably supports the complete assimilation of the Russian minority, which is clearly a state policy in the two Baltic States. Such a policy contradicts article 5(2) of the Framework Convention for the Protection of Minorities, which states that “the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.”

But what is most striking is that the Commission, on a number of occasions, simply refused to acknowledge that there were problems concerning treatment of the Russian-speaking minority, unreservedly taking the side of the two Baltic States. It is as if the Commission “participates in a national conspiracy of silence, [like some Estonians and Latvians who] simply seem to refuse to acknowledge that the Russian minority may have legitimate complaints.” All reports dealing with Latvian and Estonian preparation for accession, state that the rights of the Russian-speaking minority, with or without Estonian or Latvian nationality, continue to be observed and safeguarded. In fact, this stan-

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219 Id. at 92–93.

220 Framework Convention, supra note 39, art. 5(2).


standard was set in 1997 by Agenda 2000, which did not find any “evidence that [Russian-speaking] minorities are subject to discrimination.”

In other words, according to the Commission, there is basically no minority problem in the two Baltic States and thus no discrimination. Ironically, the Commission returned to the issue of minority discrimination in later regular reports, mostly addressing discrimination arising from the absence of nationality, having a “non state language” as a mother tongue and related to the use of the minority language, social security, education, work, and political representation. The far-reaching nature of the institutionalized discrimination based on belonging to a minority in place in Latvia and Estonia received extensive coverage in academic literature. Researchers’ findings are in clear contradiction with the Commission’s claims.

F. Different Approaches to Minority Self-Government and Political Rights of Minorities in the Two Groups

Another important issue that arose during preparation for the fifth enlargement concerned the adaptation of the candidate countries’ political systems to better accommodate minority needs. The Commission’s demands to change legislation went as high as the candidate countries’ constitutional level. In Bulgaria, for example, considering the Constitutional prohibition to form political parties around ethnic, religious or racial lines, the Commission found that “[i]t could be desirable to clarify these Constitutional provisions about the restrictions on the establishment of the political parties.”

Although a number of minorities in the first group of countries benefited from the possibility of forming political parties, using their language in communication with the authorities, and the grant of a share of self-government (whether for Hungarians in Romania or the Roma in Hungary), the Russian minority in the second group was again treated differently. The difference in treatment was largely caused by the stateless status of a huge number of individuals among the Russians in Latvia and Estonia.

Generally speaking, it is clear that “the inability of nearly one third of the population of these states to participate in elections (which is a

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225 See sources cited supra note 138.
reality, albeit to a different extent, in Latvia and Estonia) is hardly in line with norms established by western democracies. Even Latvian and Estonian non-citizens cannot vote in national elections or be members of political parties. This has been criticized by the U.N. Human Rights Committee, the CoE and the OSCE, but not by the Commission.

Even those possessing citizenship of the state in which they reside face enormous obstacles if they try to participate in political life. The Commission did little to change the situation. According to Latvian law, candidates running for office, even if Latvian citizens, had to produce a language proficiency certificate. Latvia lost a case in the European Court of Human Rights (Eur. Ct. H.R.) and proceedings in front of the U.N. Human Rights Committee in relation to this requirement. The Eur. Ct. H.R. case Podkolzina v. Latvia involved a Latvian of Russian descent who was not allowed to run for office although she possessed a language proficiency certificate of the highest third level on the grounds that she failed a “linguistic check,” administered at her work place by a special officer without prior notification. In 2002, the Eur. Ct. H.R. found that Latvia violated the claimant’s right to free elections, at the same time recognizing the importance of the legislation in force, which pleased the Commission. Indeed, the court stated that “requiring a candidate for election to the national parliament to have sufficient knowledge of the official language pursues a legitimate aim.”

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230 This author’s review of all relevant Copenhagen-related documents released by the Commission revealed no such criticism.


Soon after the *Podkolzina* case was decided, the Latvian Parliament amended the relevant legislation, lifting the linguistic proficiency requirements for candidates in national and local elections, which the Commission welcomed.\(^\text{236}\) Interestingly, the amendment came right before the North Atlantic Treaty Organization (NATO) summit in Reykjavik in May 2002, which was supposed to discuss *inter alia* the Latvian application for membership in the organization.\(^\text{237}\) Such a coincidence made scholars suspect that the law was actually amended “for the NATO.”\(^\text{238}\) Indeed, the Commission, well aware of the practices of arbitrary linguistic checks of Latvian citizens belonging to a minority willing to run for office, did not take any measures to make Latvia reconsider its policy.

The majority of Russians in the second group of countries remain largely excluded from political life because of their stateless status. In other words, the citizenship legislation (or the lack thereof)\(^\text{239}\) was used in those countries to create ethnic electorates,\(^\text{240}\) which does not comport with the democratic principles of inclusion and nondiscrimination.

G. Different Approaches to International Minority Protection Instruments in the Two Groups

Although Estonia at least ratified some international minority protection instruments by the time of its EU accession, the same cannot be said of Latvia. The Commission has been stressing the importance of Latvian ratification of the Framework Convention for the Protection of Minorities throughout the reporting exercise, starting with the Opinion on the Latvian Application for EU Membership.\(^\text{241}\) By the time the last Report (structurally based on the Copenhagen criteria) was released, the Convention *still* was not ratified. The delays, which eventually re-

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\(^{237}\) Hoffmeister, *supra* note 232, at 668.

\(^{238}\) If the amendment was not passed expressly for NATO, the proximity of the summit sheds light on the seventy-five percent majority achieved in Parliament at the ratification of the amendments—a fact also noted by the Commission. *See id*; Taube, *supra* note 232, at 514–15.


\(^{240}\) *See Visek, supra* note 221, at 354; Stepan, *supra* note 227, at 100–09.

sulted in non-accession to the Convention, did not hamper Latvian prospects of joining the European Union.242

H. Analysis of the Commission’s Approach

From the examples mentioned above it is clear that the Commission’s approach vis-à-vis minorities in each of the two groups of countries was not uniform. In fact, all the steps of the pre-accession assessment and the application of the principle of conditionality were de facto built along two different lines. The choice of a minority-protection standard to be promoted depended on the country (whether within the first or second group) and minority in question. The first standard was vaguely built around the approach to minority protection in the CoE documents and was applied in the context of the first group of countries. The second standard, built around the practices of tolerating exclusion and forced assimilation (deemed illegal by CoE minority protection documents) was applied to minorities in the second group.

Such a discrepancy between the two approaches taken by the Commission is nothing short of a disaster for the application of the conditionality principle in this field.243 Moreover, given the similarities between the practices espoused by the second group of countries during the pre-accession process, the Commission’s logic of conditionality becomes even more impenetrable with regard to the choice of countries with which to open negotiations. It is impossible to find any consistent explanation as to why the negotiations with Estonia have been opened before Latvia.

It is difficult to disagree with Marc Maresceau, who stated that “[t]he true and complete story of this unexpected choice by the Commission will probably never be fully known.”244 The only possible explanation for such a choice is probably geo-political necessity, which has nothing to do with political conditionality.245 This necessity is the same that likely explains the existence of two pre-accession minority protection standards applied by the Commission during the preparation of the fifth enlargement. Some authors link the EU decision not to include Latvia within the first wave of countries to several events that took

243 Kochenov, supra note 3, at 308–09 (noting similar disaster in other areas of pre-accession).
244 Maresceau, supra note 6, at 18.
245 See Dorodnova, supra note 138, at 9.
place in 1998. These events included a violent dispersion of a demonstration of “Russian-speaking” pensioners in March, the explosion of a bomb in front of the Russian embassy in Riga in April, and a march of the Waffen SS veterans in the Latvian capital, attended by a number of senior Latvian military officials. Taken together, these events do not produce a convincing success story on the integration of the Russian minority. Nevertheless, Latvia and Estonia already met the Copenhagen political criteria in 1997, as implied in the Commission’s Opinions.

Returning to the standards, the Commission’s stance in the field of minority rights is particularly ironic. Minority protection was probably the only area of pre-accession monitoring in which relatively clear standards were actually available, thanks to the CoE. Compared with other areas, in which such standards simply did not exist, and in which the Commission was trying to act as a “myth-maker,” playing as if it had such standards at hand (e.g., in judicial independence), the Commission, instead of applying ready-to-use CoE findings, came up with two distinct approaches that contradicted each other and sat uneasily next to the CoE documents. The example of the application of the pre-accession conditionality principle to the requirement of the “protection of and respect for minorities” illustrates the necessity to better cooperate. This is apparent from the relations between the European Union and the CoE (particularly in the context of the preparation of the enlargements of the former).

The approach of the two Baltic States can probably be explained with the concept of “ethnic democracy.” Ethnic democracy, a concept formulated in Israel, is understood as “a political system that combines extension of democratic rights for all with institutionalization of dominance by one ethnic group.” The use of this Israeli concept in

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246 See Barrington, supra note 168, at 174.
247 See id.
248 Commission Opinion on Estonian Application, supra note 165, at 116; Commission Opinion on Latvia’s Application, supra note 170, at 114.
249 See supra text accompanying notes 38–42.
EU Member States “united in diversity”\textsuperscript{253} is somewhat dubious. In contrast with the idea of domination implied in the concept, the bases of the European Union are pluralism and tolerance.

What could the Commission do to change the situation in the sphere of minority protection in the countries of the second group? The tools available to the Commission within the framework of the EU conditionality principle and enhanced pre-accession policy\textsuperscript{254} applied during the preparation of candidate countries for EU accession, provided the Commission with a wide range of options for solving the statelessness crisis in Latvia and Estonia. This allowed unification of the two contradicting approaches it applied during preparation for the fifth enlargement. Moreover, as follows from other areas of the pre-accession reform, these tools could be used in a flexible way to ensure better compliance, without bluntly dictating to candidate countries the kind of policies they are expected to adopt.\textsuperscript{255}

At least three options were available to the Commission:

1. To challenge discrimination on the grounds of the non-possession of a citizenship status by the residents of Latvia and Estonia;
2. To promote milder conditions for naturalization; or
3. To attack the citizenship policies of Latvia and Estonia directly, which would have resulted in minority acquisition of citizenship and thus the elimination of the most severe forms of discrimination.

The Commission had two main tools with which to pursue these developments. First, it had the \textit{Micheletti v. Delegación del Gobierno en Cantabria} reference to the importance of a due regard of Community Law while granting citizenship.\textsuperscript{256} The second builds on the assumption that “external pressure can be a powerful force for change.”\textsuperscript{257} Most notable


\textsuperscript{254} See Kochenov, \textit{supra} note 11, at 7.


\textsuperscript{256} Kochenov, \textit{supra} note 173, at 87 (noting that Commission actually tried to use this tool, albeit in a shy manner, consequently bringing minimal results).

within this second category, the European Union could have made effective use of the Accession Partnerships, which allows the halting of pre-accession financial assistance in cases of non-compliance and enables the Commission to go as far as freezing accession talks. Scholarly literature and the tools available to the European Union within the auspices of the pre-accession strategy, make clear that the European Union was in a privileged position to monitor and influence the minority situation in Estonia and Latvia.

While dealing with the first group of countries, unlike the second, the Commission used the third approach outlined above: the constructive critique of the grounds of naturalization. The issue was resolved quickly. It concerned the citizenship law of the Czech Republic, drafted to exclude the possibility of the Roma acquiring Czech citizenship. The Commission found that the approach taken by the Czech Republic (especially the need to provide evidence of clean criminal record for five years) was inadmissible and contrary to the succession rule. It thus demanded that the candidate country alter its naturalization policy, including the grounds for naturalization as included in the Czech law No. 40/1993 Sb., something that had never happened in the context of reporting of Latvian or Estonian progress toward accession.

Strikingly, all the international organizations and a great majority of scholars working on the minority protection issue in the two Baltic States do not discuss the legitimacy of the naturalization policy the two

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258 Council Regulation 622/98 art. 4, 1998 O.J. (L 85) 1 (introducing Accession Partnerships and making receipt of pre-accession aid conditional on pre-accession progress); see also Alain Guggenbühl & Margareta Theelen, *The Financial Assistance of the EU to its Eastern and Southern Neighbours: A Comparative Analysis*, in *The EU’s Enlargement and Mediterranean Strategies*, supra note 6, at 217.

259 See *Russian Speaking Minorities*, supra note 208, at 17.


261 See id. (providing analysis of this case).


263 Kochenov, supra note 260, at 138–40 (comparing Commission’s involvement with statelessness issues in Czech Republic with similar issues in Latvia and Estonia).
countries applied. An important exception is the position of Ferdinand de Varennes, who is among the few to question the legitimacy of linguistic proficiency requirements in those countries.264 "The exclusive preference given to Latvian and Estonian seems disproportionate and unreasonable as an attempt to rectify past Soviet practices, bearing in mind the number of permanent residents born in Estonia and Latvia but not of Estonian or Latvian 'ethnic origin.'"265 It is notable that international legal practice recognizes the application of the principle of nondiscrimination in the acquisition of citizenship.266 Citing a dissenting opinion of Judge Rodolfo E. Piza in a Costa-Rican naturalization case of the Inter-American Court, de Varennes makes a convincing argument that "a reasonable and nondiscriminatory naturalization policy must reflect, in a balanced way, the population of a state. It cannot operate in disregard of the languages actually used in the country."267 Unfortunately, neither the Council nor the CoE supported this approach.

**Conclusion: Too Many Paradoxes**

As this Article demonstrates, the web of minority protection standards in Europe is sophisticated. Not only are there CoE standards on the one hand and EU standards on the other, but EU standards are split into internal and external groups. The latter are broader in scope, while the former are hardly articulated. Despite such a split, it remains clear that it is still possible for the European Union to develop a meaningful internal minority protection standard in the future, once there is better consensus regarding this issue among the Herren der Verträge.

None of the available minority protection standards are uniform: their duality is inherent, corresponding to two levels of minority protection. This includes nondiscrimination based on belonging to a minority on the one hand, and minority protection _per se_ on the other (e.g., special rights for minorities). Not all the above standards cover both elements of such an “ideal” tandem. Although the CoE instruments allow talking about an inclusive approach, it is nevertheless clear that the nondiscrimination element of the CoE standard is better articulated,

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264 See de Varennes, _supra_ note 166, at 136–42.
265 _Id_. at 137. Maresceau made a similar point. _Quelques réflexions, supra_ note 218, at 89–95.
being inscribed in the ECHR, than is the group-rights element. This is so because the latter is mostly rooted in the documents of nonbinding nature, such as the Framework Convention. Viewed from the perspective of this duality, also reflected in academic literature and PCIJ case law, the EU approach to internal minority protection is almost totally confined to nondiscrimination and says little on the group rights issue. Moving one level of governance lower, it is clear that any more or less uniform approach to minority protection issues among the Member States is missing. Group rights are de jure illegal in some Member States (e.g., France)\(^{268}\) and taken to extremes in others (e.g., Belgium).\(^{269}\) The last enlargement only added to the array of national approaches to minority protection, making it even more uncertain that the European Union as a whole might move in the direction of articulated supranational minority protection.

The picture gains complexity once one analyzes the external aspects of EU minority rights. Historically, the European Union has used a number of different approaches to minority rights in external relations and during the preparation of enlargements. In enlargement law, the EU path has mostly been confined to total or partial exclusion of the territories with minority population from the scope of application of Community Law. The application of such a standard, however, has not always been beneficial to the minorities concerned because the scope of their Community Law rights becomes significantly narrower than that of other EU citizens. Also, in respect to islands and specific territories or communities, the standard is hardly useful in situations in which minority populations are intermingled with the majority. Taken together, both these considerations explain the reluctance to apply such a standard during the preparation of the fifth enlargement.

This reluctance, however, did not make the pre-accession process easier. Having no internal minority protection tradition, the European Union nevertheless made minority protection one of the pre-accession criteria to be met by the candidate countries. Claiming to apply a single standard in judging all applicants, which was a must in light of the pre-accession principle of conditionality, the European Union stopped short of creating a minority protection standard to be exported. Moreover, as this Article has explained, it even failed to apply similar standards of minority protection to all candidate countries,


instead applying two contradictory standards. The first standard, mostly rooted in CoE documents and applied in the context of the pre-accession assessment of the majority of the candidate countries, was drastically different from the second standard, which was applied in the context of Latvian and Estonian pre-accession progress, and will soon be contrary to law once the CoE benchmarks are applied. Defining minorities differently and adopting different approaches to minority self-governance, political participation, education and other issues, the two approaches contradict each other and hardly overlap. Generally speaking, one can state that while the Commission is clearly on the side of the minorities with respect to the first group of countries, the Commission takes the side of the candidate countries with respect to the second, turning a blind eye to Latvia and Estonia’s “undoubtedly intentional”\textsuperscript{270} policy of exclusion.

Such a vision of the promotion of minority protection in the candidate countries amounts to a disaster for the principle of conditionality. It demonstrates that there was no fair, merit-based assessment of candidate countries based on the same standards (presupposed by the principle). Dividing the candidate countries into two groups allows discovering some standards behind this “ad-hocism and inconsistency.”\textsuperscript{271} Still, the fact that there are at least two standards certainly plays against the Commission because this is precisely what the principle of conditionality was supposed to avoid.\textsuperscript{272}

The whole story of minority protection standard-setting in the European Union is that of numerous fictions and contradictions. The internal standards are weak and poorly articulated, the Member States’ national standards are contradictory, and the external standards are numerous and poorly aligned. There is little or no order in this construction.

The current state of EU standard-setting in the field of minority rights has far-reaching negative implications on the development of a consistent system of EU minority protection in the future. A number of painful choices will have to be made to alter this situation. Most importantly, the European Union’s internal standard has to be made more

\textsuperscript{270} See Blackman, supra note 169, at 1189 n.163.

\textsuperscript{271} Gwendolyn Sasse, Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?, in Enlarged European Union, supra note 12, at 69.

\textsuperscript{272} According to the Luxembourg European Council, the candidate countries were “destined to join the Union on the basis of the same criteria . . . on an equal footing.” Presidency Conclusions, Luxembourg European Council ¶ 10 (Dec. 12–13, 1997).
inclusive and uniform, while the European Union simply needs to create an external standard.

Both developments are likely to gain importance in the near future. After the incorporation of Central and Eastern European countries, the enlarged European Union is likely to face more minority-related problems than in the past, thus the need to effectively tackle them internally, both at the Member State and Community level. To make this work, a clear system of rules, which is missing at present, is indispensable. Also, to ensure smooth EU enlargement in the future, a uniform pre-accession minority protection standard needs to be devised, which would replace the two contradictory standards employed during the fifth enlargement. Such a standard will be absolutely necessary, given the human rights and minority protection record of the present day candidate countries and those states hoping to submit membership applications in the future. Only when both internal and external standards are clearly articulated will it be possible to talk about a developed EU system of minority protection standards. At present, the European Union is only making the first tiny steps in this direction.